Supreme Court, U.S.
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No. 01-

IN THE
Supreme Court of the United States

THE CITY OF LONG BEACH,

Petitioner,

v.

JOHN B. FAIRLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Pursuant to this court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986), may a city be held liable under Section 1983 when a jury has determined that the individual officers did not inflicted any constitutional harm?

2. Pursuant to this court's decision in *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), may an individual's detention on a valid warrant create a constitutional injury because a City failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person?

3. Pursuant to this court's decisions in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978) and *Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989), may a plaintiff establish liability against a municipality under Section 1983 based upon a city's failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant, when there is no evidence of any pattern of similar incidents prior to plaintiff's arrest?

PARTIES TO THE PROCEEDING

Petitioner is the City of Long Beach who was defendant in the district court and appellant in the Ninth Circuit Court of Appeals.

Respondent John B. Fairley was plaintiff in the district court and appellee in the Ninth Circuit Court of Appeals.

The police officers, who were original named co-defendants with the Petitioner, are no longer parties to this proceeding.

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Petitioner respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINION BELOW

The Ninth Circuit opinion (App. A) is reported at *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002).

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was entered on February 15, 2002 (App. A).

A petition for rehearing and suggestion for rehearing en banc was timely filed. In an order dated April 2, 2002, the Ninth Circuit Court of Appeals entered an order denying the petition for rehearing and suggestion for rehearing en banc (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The Fourth Amendment states:

> The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported under oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> 42 U.S.C. § 1983. Civil Action for Deprivation of Rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects,

> or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On Saturday April 26, 1997, Plaintiff John Fairley was placed under citizen arrest by Jeffrey Adams for violation a restraining order, and Long Beach Police Officers Javellana and Romero took plaintiff into custody.

After plaintiff Fairley was placed in the backseat of the police car, officers ran a warrant check on plaintiff and discovered two outstanding warrants that matched plaintiff's general description, warrant H66251202160 and warrant 86874119420.[1] The warrant information and booking information is as follows:

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1. Plaintiff contends that the two warrants were for his twin brother.

	WARRANT 86874119420	WARRANT H66251202160	BOOKING INFORMATION
NAME:	Joseph Benjamin Fairley	Joseph Fairley	John Fairley
DOB:	12-02-66	12-02-66	12-02-66
HAIR:	Black	Black	Black
EYES:	Brown	Black	Brown
HEIGHT:	5' 7"	5' 8"	5' 6"
WEIGHT:	190	140	206
SEX:	Male	Male	Male
ETHNIC:	Black	Black	Black
License #:	C5031440	A5388038	C5031444

Sergeant Ford, the booking sergeant, approved the booking of plaintiff for violation of a restraining order and also had plaintiff held on the above mentioned warrants.

On Monday April 28, 1997, the prosecutor declined to file charges against plaintiff for the restraining order violation, and plaintiff was released to the Los Angeles County Sheriff's Department who would handle the outstanding warrants from the Los Angeles County Court System.

On April 27, 1998, plaintiff filed his lawsuit for alleged violation of his constitutional rights by defendants. Plaintiff alleged that he was arrested without probable cause and was subjected to excessive force or unreasonable force in violation of the Fourth Amendment.

This matter proceeded to trial by jury on May 11, 1999. On May 21, 1999, the jurors returned a verdict which found that the individual defendant officers did not use any

excessive or unreasonable force on plaintiff and that the individual defendant officers did not arrest and/or hold plaintiff without probable cause. The jurors then found that plaintiff's civil rights were violated by reason of a policy, custom or practice of the Long Beach Police Department.

On February 15, 2002, the Ninth Circuit Court of Appeals issued an opinion in which it ruled that the City of Long Beach may be held liable under Section 1983 even though the individual defendant officers are exonerated. The Ninth Circuit Court of Appeals also ruled that detention pursuant to a valid warrant deprived plaintiff of a constitutional liberty because the City of Long Beach failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person and that the City of Long Beach was liable even though there was no evidence of any prior incidents of a twin or other person being mistakenly held on a warrant prior to plaintiff's arrest.

REASONS FOR GRANTING THE WRIT

I. This Court Should Review The Holding Of The Ninth Circuit That A City May Be Held Liable Under Section 1983 Even Though A Jury Has Determined That The Individual Officers Did Not Inflict Any Constitutional Harm.

In a case similar to the present, *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986), the jury found that the individual officers did not arrest the plaintiff without probable cause and did not use excessive force on the plaintiff. After the jury returned this verdict in favor of the individual officer, the District Court dismissed the action against the city concluding there could be no basis for city liability if the officer had been exonerated by the jury.

The Ninth Circuit in *Heller* believing that the jury could have believed that the officer, having followed department regulations, was entitled in substance to a defense of good faith, and that such a belief would not negate the existence of a constitutional injury. This Court, however, disagreed with the Ninth Circuit and found that the jury's negative finding was conclusive not only as to the officer, but also as to the city. This Court pointed out that:

> [N]either *Monell v. New York City Dept. of Social Services* [cite], nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. ***If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.***

Id. at 475 U.S. 799, 89 L. Ed. 2d 811. (Emphasis added).

In the present case, plaintiff Fairley, like the plaintiff in *Heller*, claimed his Constitutional rights were violated by being arrested without probable cause and being subjected to unreasonable force. The jury, however, found that there was probable cause to arrest and/or hold plaintiff and that no excessive force was used on plaintiff. As in *Heller*, these findings are conclusive that no constitutional harm was inflicted on plaintiff, and as such, there can be no liability attached to the City of Long Beach.

In its per curiam decision, the Ninth Circuit misstates this Court's decision in *Heller* . In an extreme departure from well settled law, the Ninth Circuit erroneously states that this Court's decision in *Heller* was controlling authority ***only*** as to plaintiff's excessive force case and that *Heller* had "no bearing on [plaintiff's] Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process." (*Fairley v. Luman*, 281 F.3d 913, 916-17 (9th Cir. 2002).[2] Contrary to the Ninth Circuit's decision, *Heller* concerned claim of excessive force and arrest without probable cause.

II. This Court Should Review The Holding Of The Ninth Circuit That An Individual's Detention On A Valid Warrant May Create A Constitutional Injury Because A City Failed To Institute An Identification Procedure That May Have Disclosed That The Detainee Was The Wrong Person.

In a case that falls on all fours with the present case, *Baker v. McCollan*, 443 U.S. 137, 61 L. Ed. 2d 433 (1979), the plaintiff was arrested on a valid warrant intended for his brother, and despite repeated protests of innocence, the plaintiff was held in custody for eight days. This Court rejected the plaintiff's assertion that his imprisonment violated his constitutional rights. This Court pointed out that "the Constitution does not guarantee that only the guilty will be arrested." (*Id.* 443 U.S. at 145.) This Court's analysis was that due process was satisfied by a facially valid warrant and that detention under the warrant required neither a probable cause hearing nor effective identification procedures.

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2. In *Gibson v. County of Washoe*, __ F.3d __, 2002 WL 1022340, 2002 Daily Journal D.A.R. 5649 (9th Cir. May 22, 2001) the Ninth Circuit, citing to its *Fairley* decision, has once again ruled that a municipality may be held liable even though the individual defendants were exonerated.

In the present case, the Ninth Circuit erroneously asserts that "due process imposes a requirement to take steps to verify a detainee's identity before transferring the detainee." (*Fairley v. Luman*, 281 F.3d 913, 918 n.5 (9th Cir. 2002). The Ninth Circuit's ruling is in direct conflict with this Court's decision in *Baker*. As stated above and contrary to the Ninth Circuit's decision, this court specifically ruled in *Baker* that due process was satisfied by a facially valid warrant and that detention under the warrant required neither a probable cause hearing nor effective identification procedures.

In the present case, plaintiff Fairley was held on a valid warrant, and after two days, plaintiff was turned over to the Los Angeles County Sheriff's Department who handle the outstanding warrants for the Los Angeles County Court System. Pursuant to *Baker*, the detention of plaintiff did not violate his constitutional rights.

III. This Court Should Review The Holding Of The Ninth Circuit That A City May Be Held Liable Based Upon A City's Failure To Initiate Procedures To Reduce The Likelihood Of Detaining The Wrong Individual On A Warrant, When There Is No Evidence Of Any Pattern Of Similar Incidents Prior To Plaintiff's Arrest.

Municipal liability under Section 1983 can only be imposed for injuries inflicted pursuant to an official government policy or custom. (*Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 56 L. Ed. 2d 611 (1978).) A municipality or governmental entity cannot be found liable under Section 1983 on a respondeat superior theory. (*Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989).) As the United

States Supreme Court explained in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452 (1986):

> The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible. *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered.

Id. at 475 U.S. 479-80, 89 L. Ed. 2d 463. (Emphasis is original).

The existence of a policy, without more, is insufficient to trigger local government liability under Section 1983. (*Canton v. Harris*, 489 U.S. at 388-89.) Under *Canton v. Harris*, before a local government entity may be held liable for failing to act to preserve a constitutional right, plaintiff must demonstrate that the official policy "evidences a 'deliberate indifference'" to his constitutional rights. (*Id.* 489 U.S. at 389.) This occurs when the need for more or different action "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." (*Id.* 489 U.S. at 390.)

In the present case, the Ninth Circuit ruled that plaintiff established his *Monell* claim because of the police chief's "decision not to instigate procedures to alleviate the problem

of detaining individuals on the wrong warrant."[3] (*Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002). There was no evidence of any prior incidents of a twin or other person being mistakenly held on a warrant prior to plaintiff's arrest. There was no evidence presented to place any official from the City of Long Beach on notice that its procedures that were in place at the time of plaintiff's arrest were in anyway inadequate. Plaintiff cannot prove the existence of a municipal policy based solely on a single incident.[4] (*See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791 (1985).)

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3. The Ninth Circuit's Opinion erroneously states that the City of Long Beach did not have any procedures in place to alleviate the problem of detaining individuals on wrong warrants. It was undisputed at trial that the City of Long Beach had a policy that all persons booked into the City jail go through a fingerprint check to verify any warrants, but the City of Long Beach was unable to locate plaintiff's release card verifying that a fingerprint check was performed on plaintiff.

4. The Ninth Circuit's Opinion erroneously ruled that Chief Luman was the final policy maker. As set forth in *Jett v. Dallas Ind. School District*, 491 U.S. 701, 105 L. Ed. 2d 598, 109 S. Ct. 2702 (1989), the question of whether a particular official has final policy making authority is a question of state law. Article 11, Section 2, of the *California Constitution* grants to municipalities the power to establish and run their city by way of charter. Pursuant to Section 300 of the Charter of the City of Long Beach, the chief administrative officer of the City of Long Beach is the city manager. Furthermore, Section 302 of the city charter empowers the city manager to direct and supervise the administration of all manager-directed departments of the city and to see that all laws, ordinances, orders, resolutions, contracts and franchises are enforced and executed. As such the City Manager is the final policy-making official for the conduct of the City's police department.

The Ninth Circuit's decision refers to *Oviatt v. Pearce*, 954 F.2d 1470 (9th Cir. 1992), but the *Oviatt* decision does not support the Ninth Circuit's ruling. In *Oviatt*, the Court found the sheriff acted with deliberate indifference based upon the Sheriff acknowledging 19 incidents between 1981 and 1989 in which individuals sat in jail for undetermined length after they missed arraignment. In the present case, there is no evidence that there was a pattern of similar incidents prior to plaintiff's arrest.

CONCLUSION

For all of the foregoing reasons, Petitioner City of Long Beach respectfully request that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED FEBRUARY 15, 2002

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-56483

D.C. No.
CV-99-00063-DOC-EEx

JOHN B. FAIRLEY,

Plaintiff-Appellee,

v.

ROBERT LUMAN, Chief; CITY OF LONG BEACH; JON PAUL JAVELLANA, Officer #9691, f/k/a Doe 1, a/k/a JAVELLANA; STEVEN L. ROMERO, Officer #5476, f/k/a Doe 2, a/k/a ROMERO; RYAN FORD, Sgt.,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted
March 7, 2001 — Pasadena, California

Filed February 15, 2002

Appendix A

Before: James R. Browning, Melvin Brunetti, and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion

OPINION

PER CURIAM:

Plaintiff was detained by officers of the City of Long Beach Police Department ("City") and held for twelve days on outstanding warrants for the arrest of his twin brother. Plaintiff brought a suit under 42 U.S.C. § 1983 against the detaining officers and booking sergeant for use of excessive force and arrest without probable cause and a *Monell* claim against the City for violation of plaintiff's civil rights by reason of a policy, custom or practice of its Police Department. The jury exonerated the individual officers but found the City liable, awarding plaintiff $11,250. The district court awarded attorney fees in the amount of $92,211.83. The City appeals. We affirm.

I.

On April 26, 1997, John Fairley ("John") was taken into custody by Long Beach Officers Romero and Javellana for allegedly violating a temporary restraining order after a confrontation with his next door neighbor. John claimed the officers used excessive force when taking him into custody.

After John was in custody, Officers Romero and Javellana ran a warrant check and found two 1995 infraction

warrants for *Joe* B. Fairley, John's identical twin brother. The physical descriptions of the two men were similar in certain respects: both were black, between 5'6" and 5'8", and, of course, were the same age. However, their weights differed by approximately 66 pounds and the driver's license number on one of the warrants was similar, but not identical, to the number on John's license. John had not had contact with the police in almost ten years and both he and his wife told the officers the warrants had to be for Joe. The officers knew John had a twin: the temporary restraining order application said so and his next door neighbor pointed that fact out to the officers.

Officers Romero and Javellana told the booking sergeant, Ford, that John Fairley had a twin brother, as did John himself, insisting the warrants were for his twin. Nonetheless, Sergeant Ford approved John's booking on the warrants based on the similarity in the physical descriptions alone. Neither a fingerprint comparison nor Department of Motor Vehicles check was completed at any time during John's twelve-day detention. Either would have immediately alerted the City it had the wrong man.[1]

John continuously protested the mistaken identity over the course of his twelve-day detention. Prison officials responded by reducing his privileges. Although the charge against John was dropped three days after his arrest, the police continued to hold him on Joe's infraction warrants and later transferred him to the Los Angeles County jail. John was released only after filing a citizen's complaint from jail.

1. The City concedes it had the fingerprints of both men which could easily have been compared.

The ensuing internal affairs investigation found the City's policies and procedures had been fully complied with in the handling of John's case.

John filed this lawsuit against Officers Romero and Javellana, the booking officer, Sergeant Ford, and the City for violation of his constitutional rights.[2] The jury exonerated the individual officers of using excessive force and arresting John without probable cause, but found the City liable for violating John's civil rights "by reason of a policy, custom or practice of the Long Beach Police Department." The district court denied the City's motion for judgment as a matter of law or, in the alternative, for a new trial. The City appealed.

II.

The City's principal argument is that it is entitled to judgment as a matter of law because the jury determined that the individual officers had inflicted no constitutional injury.

In *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court held that municipalities were "persons" under § 1983 and thus could be held liable for causing a constitutional deprivation.[3] *Id.* at 690. The Court

2. Charges against Chief of Police Robert Luman in his individual and official capacities were dismissed at trial.

3. Section 1983 provides that "any person" who under the color of law causes the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983.

explained that while a municipality may not be held liable under § 1983 for the torts of its employees on a theory of *respondeat superior*, liability may attach where the municipality *itself* causes the constitutional violation through the execution of an official policy, practice or custom. *Id.* at 690-691.

The City claims the Supreme Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), and this court's decisions in *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), and *Quintanilla v. City of Downey*, 84 F.3d 353 (9th Cir. 1996), preclude municipal liability as a matter of law under § 1983 when the jury exonerates the individual officers of constitutional wrongdoing. In *Heller*, the Supreme Court held a jury's determination that an individual officer did not use constitutionally excessive force precluded § 1983 municipal liability on that ground. *Heller*, 475 U.S. at 799. ("neither *Monell* [citation omitted] nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitution harm.") Similarly, in *Scott* and *Quintanilla*, we affirmed summary judgment in favor of cities sued under § 1983 where the defendant officers charged with excessive force were individually exonerated. *Scott*, 39 F.3d at 916; *Quintanilla*, 84 F.3d at 356.

Heller, *Scott* and *Quintanilla* control John's excessive force claim. Exoneration of Officer Romero of the charge of excessive force precludes municipal liability for the alleged unconstitutional use of such force. To hold the City liable

for Officer Romero's actions, we would have to rely on the § 1983 *respondeat superior* liability specifically rejected by *Monell*.

However, these decisions have no bearing on John's Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process. These alleged constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court recognized that the city could be held independently liable under § 1983 for failure to train its police officers even though no individual defendants were sued. This Court reached the same conclusion in *Oviatt v. Pearce*, 954 F.2d 1470, 1477-79 (9th Cir. 1992), deciding § 1983 liability could attach to a city because it failed to implement internal procedures for tracking inmate arraignments. Even more to the point, in *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), we held that a city could be liable under § 1983 for improper training or improper procedure even if the individual officer charged with violating the plaintiff's constitutional rights was exonerated.

The district court did not err by denying the City's motion for judgment as a matter of law on the *Monell* claim based on the jury's exoneration of the individual officers alone. If a plaintiff establishes he suffered a constitutional injury *by the City*, the fact that individual officers are exonerated is

immaterial to liability under § 1983.[4] Otherwise, municipal liability may attach where a constitutional deprivation is suffered as a result of an official city policy but no individual officer is named as a defendant, *see City of Canton,* but not where named individual officers are exonerated but a constitutional deprivation was in fact suffered. In either case, a constitutional deprivation — the touchstone of § 1983 liability — was a consequence of city policy.

III.

The City claims John's *Monell* claim failed because he did not prove he suffered a constitutional injury or that the City had a policy, custom, or practice that caused such injury. Since the jury did not specify the constitutional deprivation upon which it based its finding of municipal liability, we consider whether, viewed in the light most favorable to John and drawing all reasonable inferences in his favor, there is sufficient evidence for a reasonable jury to find John met his burden on any claim supported by the record. *See Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000);

4. This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof. *See Chew v. Gates,* 27 F.3d 1432, 1438 (9th Cir. 1994) ("Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury."); *Fagan v. City of Vineland,* 22 F.3d 1283,1291-1294 (3d Cir. 1994) (holding municipality may be liable under § 1983 even if no individual officer violated the Constitution); *Cannon v. Taylor*, 782 F.2d 947, 951 (11th Cir. 1986) (considering municipal liability for failure to train after individual defendant officer found not liable because merely negligent).

Fed. R. Civ. P. 50(a)(1). We conclude there was sufficient evidence for a reasonable jury to find John suffered a constitutional deprivation under the Fourteenth Amendment. We do not address his Fourth Amendment claims.

A. *Constitutional Injury*

Even detention pursuant to a valid warrant but in the face of repeated protests of innocence will, after a lapse of time, deprive the accused of a constitutional "liberty." *Baker v. McCollan*, 443 U.S. 137, 143 (1979). "[A]n individual has a liberty interest in being free from incarceration absent a criminal conviction." *Lee v. City of Los Angeles*, 250 F.3d 668, 683 (9th Cir. 2001) (quoting *Oviatt*, 954 F.2d at 1474). Indeed, we have stated freedom from incarceration is the "paradigmatic liberty interest" under the due process clause. *Oviatt*, 954 F.2d at 1474.

John had a liberty interest in being free from a twelve-day incarceration without any procedural safeguard in place to verify the warrant he was detained on was his and in the face of his repeated protests of innocence.[5] In light of the importance of John's liberty interest, the significant risk of deprivation of that interest through the City's warrant procedures, and the minimum burden to the City of instituting

5. The City's responsibility for his detention was not defeated by John's transfer to the L.A. County Jail for four days. Due process imposes a requirement to take steps to verify a detainee's identity before transferring the detainee. The consequences of the transfer were foreseeable and the transfer did not break the chain of causation between the City's failure to take steps to identify John and his detention.

readily available procedures for decreasing the risk of erroneous detention, the procedures afforded by the City to John failed to provide him due process under the Fourteenth Amendment.[6]

B. *Policy or Custom*

A "policy" is " 'a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " *Oviatt*, 954 F.2d at 1477 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). A "policy" can be one of action, *see Monell*, 436 U.S. at 661 (forcing women to take early maternity leave), or inaction, *see City of Canton*, 489 U.S. at 387 (failure to train); *Oviatt*, 954 F.2d at 1477 (failure to implement adequate procedural safeguards).

John presented evidence sufficient to establish the City's warrant procedures constituted a "policy." Chief Luman testified at trial that he was "the chief policymaker for law enforcement matters for the City of Long Beach." His decision not to instigate any procedures to alleviate the problem of detaining individuals on the wrong warrant could constitute a policy in light of his testimony he knew it was "not uncommon" that individuals were arrested on the wrong

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6. Under *Mathews v. Elderidge*, 424 U.S. 319, 335 (1976), three factors are used to evaluate whether procedural protections comport with due process: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and probable value of additional safeguards; and (3) the Government's interest.

warrant, and that the problem was particularly acute where twins were involved. As in *Oviatt,* where the city failed to implement internal procedures for tracking inmate arraignments, the policy was one of inaction: wait and see if someone complains. *Oviatt*, 954 F.2d at 1477.

IV.

The evidence admitted at trial was legally sufficient to permit a reasonable jury to find the City liable under John's § 1983 *Monell* claim even though the jury found the individual defendants inflicted no constitutional harm. Since the verdict was not contrary to the clear weight of the evidence, the district court did not abuse its discretion by denying the City's motion for a new trial.

The district court's denial of judgment as a matter of law, and in the alternative, a new trial is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED AND FILED APRIL 2, 2002

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56483

D.C. No. CV-99-00063-DOC-EEx

JOHN B. FAIRLEY,

Plaintiff-Appellee,

v.

ROBERT LUMAN, Chief; CITY OF LONG BEACH; JON PAUL JAVELLANA, Officer #9691, f/k/a Doe 1, a/k/a Javellana; STEVEN L. ROMERO, Officer #5476, f/k/a Doe 2, a/k/a Romero; RYAN FORD, Sgt.,

Defendant-Appellant.

ORDER

Before: BROWNING, BRUNETTI, and HAWKINS, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judge Hawkins has voted to deny the petition for rehearing en banc, and Judges Browning and Brunetti so recommend.

Appendix B

The full court has been advised of the petition for an en banc rehearing, and no judge of the court has requested a vote on the petition. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
OCT 24 2002
OFFICE OF THE CLERK

No. 01-1882

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF LONG BEACH,

Petitioner,

vs.

JOHN B. FAIRLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is it reasonable under the Fourth Amendment to arrest a person under a warrant for the person's twin, on the ground that the twins have the same birthdate and similar physical descriptions, where the twins have different first names, and it is known that the person being arrested has a twin?

2. Where a person is arrested under a warrant for a person with a different name, under circumstances indicating that the person arrested may well not be the person for whom the warrant was issued, does due process require the arresting agency to use readily available procedures for decreasing the risk of erroneous detention, or may the arresting agency, despite protests of innocence, simply ignore all evidence that it has arrested the wrong person?

3. Where a plaintiff fails to carry his burden of proving, by a preponderance of the evidence, that one of several persons possibly responsible for a constitutional violation should be held personally liable, and other persons who are possibly responsible are not defendants, and the named defendant seeks to shift responsibility to the unnamed persons, does a jury's decision not to return a verdict against the named defendant necessarily mean that the plaintiff has not suffered a constitutional injury?

4. Where a plaintiff fails to carry his burden of proving, by a preponderance of the evidence, that an individual defendant should be held personally liable for a constitutional violation, and all of the defendants, including the individual defendant's public entity employer, claim that individual defendant acted reasonably because he acted in accordance with the training provided by the public entity employer, and therefore should not be held personally liable

and, despite request, the jury is not instructed that "following orders" is not a defense, does a jury's decision not to return a verdict against the individual defendant necessarily mean that the plaintiff has not suffered a constitutional injury?

5. Where a public entity admits, in response to Requests for Admissions, and in the testimony of its "chief policymaker" and employees, that its employees acted "in accordance with and pursuant to the policies and practices" of the entity, is there sufficient evidence upon which to base a determination that the employees in question acted pursuant to the customs, practices or policies of the entity; or is custom, practice and policy only provable through circumstantial evidence that employees have done the same thing on other occasions?

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STATEMENT OF THE CASE

Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002), is a thoughtful, well-founded and routine application of the principles set forth in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) for determining when a public entity may be held accountable after arresting the wrong person. No significant conflicts have developed among the federal or state courts. In short, the standards of Rule 19 have not been met and this petition should be denied.

Fairley arises from a jury verdict that the City of Long Beach was liable for violating respondent's civil rights "'by reason of a policy, custom, or practice of the Long Beach Police Department.'"

The policy causing Mr. Fairley's injuries was petitioner's failure to institute "readily available procedures for decreasing the risk of erroneous detention." Petition, *Appendix A*, at 8a.

The violations "were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." Petition, *Appendix A*, at 6a.

FACTS

On April 26, 1997, Long Beach police officers Romero and Javellana mistakenly arrested respondent John B. Fairley

for violating a restraining order. Not knowing the difference between an *ex parte application* for a restraining order and an actual *order*, they arrested Mr. Fairley for coming within *fifty* yards of his neighbor *Jeffrey* Adams, even though the *order* (as opposed to what was sought in the *ex parte application*) only prohibited Mr. Fairley from approaching within *five* yards of his neighbor *Chrystalynn* Adams, only.[1] When the officers called in to verify that the order had been filed with the department, unknown department employees did not know to inform the officers *what* the actual order prohibited, or *to whom* it applied.[2]

All of the defendants, in response to a F.R. Civ. P. Rule 36 Request for Admissions, admitted that Mr. Fairley's arrest for violation of a restraining order was in accordance with and pursuant to the customs, practices and policies of the Long

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[1] The officers had never been trained to distinguish between an application for an order and an order. RT 118:20-23. They didn't realize that an order requires action by a judicial officer. RT 159:8-12. The officers thought the stamp showing the *ex parte* application had been *filed* was all that mattered. RT 119:1-14, 181:4-21, 183:6-8. The officers had been trained that the *ex parte* application was a valid order until "they go to court a second time." RT 157:18-19. Also, they had never been trained to ask for a certified copy of the order, RT 159:13-15, though California law so requires. RT 481:11–82:8 (defense expert). The *ex parte* application stated, on each pre-printed page, "This is **NOT** an order," CR 1,2,5; RT 120:25–121:25, 182:9-14, 211:5-21.

[2] The Department had on file a copy of the order, showing it had no application to Jeffrey, and only ordered Mr. Fairley to stay five yards away from Chrystalynn. RT 232:15-21. Following department procedure, the officers called dispatch, who told them a valid order was on file, but the officers did not ask and were not told that the order did not apply to Jeffrey, or what the terms of the order actually were. RT 183:18–184:12, 215:10–216:8, 217:3-18, 218:4-7. Pursuant to Department policy, nobody was required to look at the order to see whether there was any violation, and nobody did. RT 243:16-22. The only concern was whether an order was on file, had been served, and had not expired. RT 297:6-9, 311:22–312:8.

Beach Police Department. RT 620:25–621:4. At trial, each defendant and the Chief of Police, Robert Luman, the "chief policymaker for law enforcement matters for the City of Long Beach," CR 167 (Luman 6:24–7:1), testified that their arrest of Mr. Fairley for violating a restraining order was in accordance with Department policy. RT 192:2-6, 217:19-24 ("perfectly in accordance with the training and procedures and policy of the Long Beach Police Department"). Chief Luman testified that Department policy did not require the officers to ask who the order applied to and that no one was required to tell them. CR 199 (Luman 38:7-12).[3]

Since Long Beach policy "strictly prohibited" officers from handcuffing people in front, and "strictly require[d] that a person be handcuffed behind the back when transported in a squad car," regardless of physical condition, RT 145:22–146:7, 167:10-18; 492:2-5, the officers insisted on handcuffing Mr. Fairley behind his back, even though Mr. Fairley had a very serious shoulder injury which required him to wear a sling and walk with a cane. As a consequence, the officers re-

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[3] After Mr. Fairley's release, he returned to the Department and complained that he had been wrongly arrested. RT 664:16-128. Under California law, the Department was required to conduct an investigation. RT 314:17-24. The Department conducted what it claimed to be an investigation. During the investigation, it never looked at the restraining order, RT 388:19–389:23, CR 266 (Luman 105:13–106:4), and did not inform any of the employees involved (including both defendants and those not named as defendants) that they had erroneously arrested and booked Mr. Fairley for violating a restraining order. RT 123:4-21, 184:14-18, 191:16-20, 246:5-8 (clerk Retha Edmonson), 247:1-21 (same), CR 268 (Luman 107:2-12). The Department never told any of the officers that somebody should have asked to see a copy of the order, looked at a copy of the order, or asked someone else to verify to whom the order applied and what its terms were. RT 123:12–124:3, 184:14-18, 191:21–192:1, CR 204 (Luman 43:12-17). According to both the Department's designated agent and Chief Luman, the Department's investigation was perfectly adequate. RT 400:20–401:10, CR 180 (Luman 19:7-10, 20:5-11, 104:21–105:1).

dislocated Mr. Fairley's shoulder and exacerbated Mr. Fairley's injury.

After arresting Mr. Fairley, Officers Romero and Javellana ran a warrant check. They found two warrants for ***Joseph*** Benjamin Fairley, Mr. Fairley's twin. RT 521:19-21, 522:7-11, 523:1–524:8. Mr. Fairley and his wife told the officers he had a twin, Joe, and the warrants had to be Joe's. RT 580:10-20, 620:20-24 (Request for Admissions Response), 124:18-125:4, 643:12-14, 185:18-25. The arresting officers had no doubt that Mr. Fairley did have a twin because the application for a restraining order said he did. CR 1, RT 125:20–126:15, 184:19–185:3, 186:1-4; 187:13 ("There's no doubt that he had a twin brother."); 189:8-10 (same).[4] The officers knew "there was a big question about whether or not the John Fairley . . . in custody was the Joe Fairley who was identified in the two warrants." RT 187:21-23, 190:2-4 (officers knew "these warrants may well not be Mr. Fairley's").

Romero and Javellana did not arrest Mr. Fairley on Joe's warrants because they were unsure if they were for Mr. Fairley. They alerted the booking sergeant, Ford. Romero made certain that Ford knew that Mr. Fairley had a twin. RT 188:15-18, 189:6-20. Ford booked Mr. Fairley on Joe's warrants. RT 249:21–250:1.

At trial, Ford claimed that the decision to book Mr. Fairley was made by "Records Division," "where a fingerprint classifier will classify the fingerprints to verify the person in

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[4] Additionally, Chrystalynn specifically alerted the Department to the fact that Mr. Fairley had a twin. Exhibit 5, AER 193; RT 232:5-7, 417:11–22, CR 262 (Luman 101:13–102:21).

custody is in fact the person he says he is, and any added charges or holds or warrants are verified against fingerprints if they were available." RT 289:12– 290:7, 746:21–747:1. Ford also claimed that DMV records were supposed to be checked by somebody else, a clerk typist. RT 250:19-20.

Determining whether a warrant applies to a particular person is something that law enforcement officers have to do every day. RT 130:11, 287:19, CR 211 (Luman 50:25–51:16). Luman knew twins often have the same last name, physical description, and birth date. RT 282:17-20, CR 212 (Luman 51:17–52:20). It is not uncommon that twins are booked on their twin's warrants. RT 252:2-9. Where officers know that a person has a twin, they have the obligation to investigate whether the warrant is for the twin. RT 418:15-22.

However, pursuant to Department policy, no one did anything to investigate whether either warrant in fact belonged to Joseph, the person named in the warrants, rather than Mr. Fairley. RT 272:2-8, RT 311:11-14, 431:8-19, CR 237 (Luman 76:23–77:22, 79:20–80:10, 85:4-10). The City failed to provide Ford training in how competently to perform his job, RT 279:8–280:16, 281:25–282:16, 287:1-3, in particular with regard to twins. RT 284:14–285:21.

The Department easily could have verified through quickly accessible computer records, but did not, that Joseph B. Fairley existed, and that all of the identifying information on the $1357 Compton warrant, including Joe's DMV number and residence address, exactly matched Joe, not Mr. Fairley. RT 253:2-15, 269:23–270:4, 299:2-16, 300:5-8, 302:3-10, 303:9-23, 305:15-20, 526:17-19, 535:23-24. The Department also could easily and conclusively have determined that the $277 Van Nuys warrant was for Joe, not Mr. Fairley. Joe's fingerprints

were available, 523:10-14, because Joe was booked and fingerprinted on the Van Nuys offense before he was released. RT 529:12-16, 538:21-23, 539:8-12. Had the Department bothered to do so, which it did not, RT 272:2-8, 755:8-13, 757:16-20, 290:17-22, it would quickly have learned those fingerprints belonged to Joe, not Mr. Fairley. RT 270:11-271:8, 463:13 (defense expert: "technology today is quite instantaneous"),753:22–754:1, 756:5-13, CR 217 (Luman 56:20-25).

After learning that he was being booked on his twin's warrants, Mr. Fairley called his wife and told her to bring all of his identification to the jail. RT 653:3-6. Unidentified jail personnel told Mr. Fairley to instruct his wife not to bring the identification. RT 581:11-14, 591:10-12, 653:6-8. In response to Mr. Fairley's complaints that he was being held on his twin's warrants, unidentified jail personnel told him it was his fault he had a twin and that he should change his name. RT 653:17-21. When Mr. Fairley continued to complain, unidentified jail personnel took away his sleeping mat. RT 652:12-13.

All of the defendants, in response to plaintiff's F.R. Civ. P. Rule 36 Request for Admissions, admitted that both warrant arrests were in accordance with and pursuant to the customs, practices and policies of the Long Beach Police Department. RT 621:5-14. At trial, each defendant and the Chief of Police, Luman, testified that their arrests of Mr. Fairley on the warrants were in accordance with Department policy. CR 244 (Luman 83:19-24).

In response to Mr. Fairley's citizen's complaint that he had been arrested on Joe's warrants, the Department, although California law required it to do so, RT 396:6-15, 407:3–8:3, CR 223 (Luman 62:19-23, 63:24–64:4), did nothing to find out

whether Mr. Fairley's complaint was true (*i.e.*, whether the warrants were for Joe), RT 325:10-16, 410:1–411:1, 411:19-23, 431:8-19, and nothing to find out what Sgt. Ford had done or not done before booking Mr. Fairley on the warrants. RT 273:14-18, 274:9-12, 320:19–1:16, RT 416:6-12, CR 226-30, 249-59 (Luman 65:10-16, 66:2-8, 68:25–69:6, 86:14-23, 88:2-7, 90:4-20, 93:11-95:5, 95:24–96:17). The Department did not even find out that Romero had told Ford Mr. Fairley had a twin. RT 433:9-12, CR 262 (Luman 101:8-12). The Department did not care that it had arrested the wrong person. RT 432:4-11 ("his information was a defense for him to use in criminal court").

Mr. Fairley requested jury instructions that, in determining whether the officers had acted in an objectively reasonable manner, their "underlying intent" and/or "reliance on Department policy" were not defenses.[5] These instructions were refused. RT 843:3-5.

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[5] Mr. Fairley's rejected instructions included:

> Whether an officer's actions are "reasonable" under the Fourth Amendment must be determined in light of the facts and circumstances confronting them, without regard to the officer's underlying intent or motivation.

AER 3 (Requested Instruction No. 57).

> A police officer may not justify his conduct on grounds that his conduct was in conformity with the policy or practice of his department. The test is whether the conduct of the officer is objectively reasonable, not whether the officer acted in compliance with department policy or practice.

AER 6 (Requested Instruction No. 61).

ARGUMENT

I. MR. FAIRLEY'S DUE PROCESS RIGHTS WERE VIOLATED.

Petitioner's second question, "may an individual's detention on a valid warrant create a constitutional injury because a City failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person?", does not justify a grant of *certiorari*.

Baker itself makes clear that police do not have *carte blanche*. 443 U.S. at 145-46 ("mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'"). Lower courts have consistently recognized that "[t]he *Baker* decision has not been read to preclude all § 1983 claims based on false imprisonment." *Cannon v. Macon County*, 1 F.3d 1558, 1562 (11th Cir. 1993). The "Court . . . suggested that at some point, even though law enforcement officials are proceeding pursuant to a valid warrant in the face of protestations of innocence, detention of that individual would run afoul of the *Constitution.*" *Sanchez v. Swyden*, 139 F.3d 464, 468 n.8 (5th Cir. 1998). "A prolonged confinement of an arrested person without a hearing to determine whether he is the person named in the warrant would be a deprivation of liberty without due process of law and thus violate the Fourteenth Amendment . . . ." *Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir. 1987), *cert. denied*, 484 U.S. 855, 108 S.Ct. 162, 98 L.Ed.2d 117 (1987).

Contrary to petitioner's assertion, Petition 7, *Baker* is

not at all "on all fours with the present case." Since McCollan's brother had "procured a duplicate of Linnie's driver's license," 443 U.S. at 140, the warrant was *issued for McCollan*, and therefore exactly described and *named* McCollan. As a result, the arresting officers "understandably concluded that they had their man," 443 U.S. at 141, and there was consequently "no suggestion that respondent's arrest was constitutionally deficient." 443 U.S. at 143. The Court held that, because a "facially valid warrant," 443 U.S. at 143, had been issued for McCollan, the Due Process Clause did not require defendant to investigate McCollan's complaint, during "three days over a New Year's weekend," 443 U.S. at 145, that the warrant had been erroneously *issued*.

Unlike *Baker*, Mr. Fairley was arrested on warrants issued for another person. Unlike *Baker*, the warrants did not authorize the arrest of a person named *John* Fairley. Unlike *Baker*, Mr. Fairley contended that there was not probable cause to arrest him in the first place. Unlike *Baker*, from the face of the warrants and known information—that Mr. Fairley had a twin brother—it was immediately obvious that there was at the very least grave doubt whether the warrants were for Mr. Fairley. Unlike *Baker*, defendants *never* investigated whether they had the right man.[6]

Courts have expressly recognized that *Baker* is not controlling where "the policeman executed the warrant against the wrong person," *Patton v. Przybylski*, 822 F.2d 697,

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[6] Mr. Fairley was released after twelve days in jail, as the result of a court order. Long Beach did not bother to investigate even after Mr. Fairley returned to the Long Beach Police Department and complained.

699 (7th Cir. 1987) (Posner)[7], even where the person arrested has exactly the same name. 822 F.2d at 698.

Here, Long Beach arrested Mr. Fairley on warrants for somebody else, Mr. Fairley's twin brother, Joseph Benjamin Fairley. Therefore, *Baker* is not controlling.

More significantly, unlike *Baker*, here the warrants on their face authorized the arrest of a person with a different name. The warrants named Joseph Benjamin Fairley, not John Fairley. Because the warrants did not name *John* Fairley, they should not, contrary to petitioner's assertion, Petition 7, be considered "facially valid." Rather, as applied to *John* Fairley, they were facially *invalid*.

In *West v. Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894), the "the granddaddy of these cases,"[8] the Court held

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[7] *See also Johnson v. Miller*, 680 F.2d 39, 41 (7th Cir. 1982) ("execution against the person named in the warrant does not violate the Fourth Amendment even if, because someone has made a mistake, the person named in the warrant is not the person whom the authorities intended to arrest," citing *Baker*); *Simons v. Clemons*, 752 F.2d 1053, 1054-55 (5th Cir. 1985) (no constitutional deprivation because plaintiff held only 14-16 hours on facially valid warrants for plaintiff, although warrants should not have been in system); *Sanchez v. Swyden*, 139 F.3d at 468 (no constitutional deprivation because plaintiff held only 26 hours on facially valid warrant in plaintiff's exact name, birth date and social security number); *cf. Berg v. County of Allegheny*, 219 F.3rd 261, 273 (3rd Cir. 200), *cert. denied* 531 7U.S. 1072, 121 S.Ct. 791, 148 L.Ed.2d 664 (2001) and *cert denied*, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001) ("an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances. Such circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight.")

[8] *Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir. 1987) (Posner), *cert. denied*, 484 U.S. 855, 108 S.Ct. 162, 98 L.Ed.2d 117 (1987).

that "a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him." *West*, 153 U.S. at 85. According to the Court, this "principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest." 153 U.S. at 86. In short, a "particular description in the warrant" is "a constitutional requirement." 153 U.S. at 88.

In *West*, the Court held that arresting Vandy M. West on a warrant naming James West violated the Fourth Amendment, even though the issuing commissioner "'did not know of any other West living at or near Mineral Wells,'" and *intended* that Vandy M. West be arrested.

Cases decided after *Baker* continue to recognize the importance, under both the Fourth and Fourteenth Amendments, of the *name* on the warrant.

In *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989), the Fifth Circuit held that arresting *Tammy Jean* Brown on a warrant for *Tammie* Brown, 870 F.2d at 977, was *not* an arrest on a "facially valid warrant." In accordance with *West* and common sense, the court held that "[t]he existence of a facially valid warrant for the arrest of one person does not authorize a police officer to effect the arrest of another person, even if the officer believes the second person guilty of the first person's crimes and even if the two people have similar names." 870 F.2d at 979.

The Eleventh Circuit recognized the importance of

name discrepancies in *Cannon v. Macon County*, 1 F.3d 1558,1564 (11th Cir. 1993) and *Rivas v. Freeman*, 940 F.2d 1491, 1492-93 (11th Cir. 1991). Defendants arrested Ms. Cannon when informed that a wanted person had used a name similar to hers as an alias. 1 F.3d at 1560. Despite protestations of innocence and differences in physical descriptions, 1 F.3d at 1560-61, defendants "held Cannon in jail for seven days without making any effort to attempt to determine Cannon's identity." 1 F.3d at 1561-62. Because of the discrepancies, the court held that "Cannon presented sufficient evidence from which a jury could find that Collins acted with deliberate indifference when he completed the arrest procedure and obtained a fugitive warrant for her arrest without speaking to Cannon and without making any attempt to identify her as the person wanted in Kentucky," and violated "Cannon's due process rights." 1 F.3d at 1564.

In *Rivas*, the Eleventh Circuit affirmed a $100,000 judgment against the Sheriff "because he failed to establish sufficient and appropriate procedures and policies regarding identification of arrestees," 940 F.2d at 1495, thus causing deputies to arrest and hold Alfredo *Falcon* Rivas for six days on a warrant for Alfredo *Celestino* Rivas. 940 F.2d at 1493. The court focused on evidence that the sheriff "allowed his deputies to detain individuals even where discrepancies existed." 940 F.3d at 1495.

Therefore, contrary to defendant's characterization, the Fourteenth Amendment question here presented is whether police have *any* obligation to do *any* investigation when they arrest someone *not* named in the warrant who is probably *not* the person wanted on the warrant.

That question also does not justify granting *certiorari*.

The courts have consistently recognized that law enforcement should have adequate procedures for identifying suspects. "Consistent with the dictates of *Harris*, we find that confirming the identity of persons arrested under an arrest warrant is a 'usual and recurring' situation with which police must deal. . . . Compared to *Harris*, we think the identification of suspects presents an even more compelling situation for the application of a failure-to-train theory since the arrest and detention of criminal suspects falls within the regular and ordinary course of police conduct." *Johnson v. City of Chicago*, 711 F. Supp. 1465, 1472 (N.D. Ill. 1989).

In *Rivas*, the court affirmed a judgment against the sheriff "because he failed to establish sufficient and appropriate procedures and policies regarding identification of arrestees, warrantless searches, and computer checks for information." 940 F.2d at 1495.

II. LONG BEACH IS RESPONSIBLE FOR THE VIOLATION OF MR. FAIRLEY'S RIGHTS.

Relying on *Monell* and *City of Canton v. Harris*, Long Beach asks the Court to consider whether it can be held liable for its failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant where there was "no evidence of similar incidents prior to plaintiff's arrest." Question 2; Petition 8.

This evidentiary question does not justify review. Petitioner points to no authority requiring Mr. Fairley to establish defendant's policies and practices through circumstantial evidence ("similar incidents prior to plaintiff's arrest") when there was abundant other evidence, including admissions.

Defendants' responses to Requests for Admissions, admitting that arresting Mr. Fairley on the warrants was "in accordance with and pursuant to the policies and practices of the Police Department of the City of Long Beach," established the facts admitted. F.R. Civ. P. Rule 36 (b); *see Berg v. County of Allegheny*, 219 F.3rd at 276 ("the County conceded that Demko 'followed the practices and procedures which had been in effect at the time she started working'"). So, too, did the testimony of defendant's "chief policymaker for law enforcement matters for the City of Long Beach," CR 167 (Luman 6:24–7:1),[9] that the arrests of Mr. Fairley on the warrants were in accordance with Department policy. CR 244 (Luman 83:19-24).

Neither *Harris* nor any other authority requires "evidence of similar incidents prior to plaintiff's arrest," to establish the obvious, *i.e.*, that determining whether a warrant applies to a particular person, is one of the "usual and recurring situations with which they must deal." 489 U.S. at 390. Nor is evidence of "similar incidents prior to plaintiff's arrest" necessary to prove that twins often have the same last name, physical description, and birth date, are commonly booked on their twin's warrants, and that law enforcement in such cases is "obligate[d] . . . to do some further investigation." RT 418:15-22. Assuming common sense is not enough, these facts may be proven by other evidence, as they were here, through the admissions of the Chief of Police and defendant's designated agent.

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[9] Petitioner's argument, Petition 10 n.4, that the Ninth Circuit "erroneously ruled that Chief Luman was the final policy maker" is frivolous and waived. Chief Luman testified he was "'the chief policymaker for law enforcement matters for the City of Long Beach.'" Petition, *Appendix A*, at 9a. Petitioner never raised the argument in the Ninth Circuit.

Despite having Mr. Fairley's identification and knowing that Mr. Fairley had a twin brother, defendant's policy was simply that, for government w[illegible]k, "John" was close enough to "Joseph." Defendants did not bother with "readily available" information proving Mr. Fairley was the wrong person because it was merely "a defense for him to use in criminal court." RT 432:10-11.

III. NOT FINDING JAVELLANA, ROMERO OR FORD LIABLE DID NOT MEAN MR. FAIRLEY'S RIGHTS WERE NOT VIOLATED.

Relying on *Heller*, Long Beach asks the Court to consider whether it can be held liable for its failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant when a jury has determined that the "individual officers" "did not inflict any constitutional harm?" Question 1; Petition 5.

The question presented does not justify review. *Heller* is premised on the assumption that the "individual officer" must have inflicted the "constitutional harm," if there were any "constitutional harm" inflicted. Here, as the Ninth Circuit correctly observed, the "constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." Petition, *Appendix A*, at 61.

Petitioner has not even bothered to address the lower court's actual holding, much less try to explain why it is incorrect.

The jury's determination that Romero and Javellana were not responsible for arresting Mr. Fairley on Joe's

warrants is of no significance at all, since they did not arrest Mr. Fairley on Joe's warrants.

At trial, Ford claimed that the responsibility lay in "Records Division," "where a fingerprint classifier will classify the fingerprints to verify the person in custody is in fact the person he says he is, and any added charges or holds or warrants are verified against fingerprints if they were available." RT 289:12– 290:7, 746:21–747:1. Ford also claimed that DMV records were supposed to be checked, by somebody else. RT 250:17-20.

To establish liability against an individual, Mr. Fairley was required to establish by a preponderance of the evidence that that individual defendant violated his rights. Here, because the decision to arrest Mr. Fairley was spread among several people— including City employees not named as defendants— the jury may well have found that someone other that the named individual defendants was actually responsible. For example, it might have been the person who was supposed to check the fingerprints but did not; or it might have been the person who was supposed to alert officers to the fact that the restraining order did not apply but did not. In its brief in the Court of Appeals, as it did in the district court, petitioner itself attempted to shift the responsibility for Mr. Fairley's arrest away from the named individuals by claiming that the "Officers were informed by the police dispatcher that plaintiff Fairley had violated a restraining order . . . ." AB 4; *see also* AB 5 ("officers radioed police dispatch and verified that the restraining order in question was valid and had been served").

The jury probably concluded that the fault for any violation was spread among unnamed City employees, and

that Mr. Fairley simply did not carry his burden of proof as to any named individual. It would have been reasonable to conclude that Romero, Javellana and Ford shouldn't be held personally liable for arresting Mr. Fairley for violating a restraining order because the foul up was due to the failure of the Department to require somebody in Records to inform them of its terms. Similarly, the jury could have concluded that Ford shouldn't be held personally liable for booking Mr. Fairley on Joe's warrants because that error was due to the failure of somebody in Records to check fingerprints or DMV records.

There was obviously more evidence that the City's customs, practices and policies led to the wrongful arrest of Mr. Fairley for violating a restraining order which didn't exist and warrants which weren't his than there was evidence that any named individual should be held personally liable. If the City took people's rights seriously, the Department would have appropriately trained its employees and acted responsibly in the ensuing investigation. The jury acted predictably by placing responsibility on the City for its deficient customs, practices and policies, rather than on officers who were merely doing what they were expected to do. *See* Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 800 (1979) (jurors give police "benefit of any doubt" when "acting in the course of his duties"); Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 Hast. L.J. 499, 548 (1993) ("[J]urors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department

policy as an obedient employee.").[10]

Even if the named individuals were the "immediate" cause of Mr. Fairley's injuries, their exoneration would not necessarily mean that Long Beach was not liable.

> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice, implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city causes the officer to deprive the plaintiff of his

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[10] The strength of the "following orders" defense is profound. Even United States Nuremberg Chief of Counsel for War Crimes, General Telford Taylor, believed that "Article 8 of the Charter, providing that obedience to a superior's command to commit a crime should be considered only in mitigation . . . is flawed. If the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all." Telford Taylor, The Anatomy of the Nuremberg Trial 630 (1992).

> liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994).[11] *See also Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148, 130 L.Ed.2d 1065, 115 S.Ct. 1097 (1995) ("Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury.").

Rivas is analogous. There, the court affirmed the judgment as to the sheriff, but reversed as to the deputies. The court held that the sheriff was liable because he failed adequately to train his officers regarding reliable identification procedures. The court reversed as to the deputies because their failure to identify correctly the plaintiff did not amount to gross negligence or deliberate indifference to his constitutional rights.

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[11] In *Fagan*, the Third Circuit granted rehearing *in banc* and, contrary to the panel's holding, affirmed the trial court judgment. However, Chief Judge Sloviter's *in banc* opinion stated it was not disturbing the panel's holding regarding *Heller*. *See also Simmons v. City of Philadelphia*, 947 F.2d 1042, 1089 n.1 (3rd Cir. 1991) (Sloviter, C.J., concurring), where Chief Judge Sloviter concluded that "the jury verdict can be upheld on the basis of the City's liability independent of [the line officer's] culpability.").

CONCLUSION

For the foregoing reasons, respondent urges the Court to deny the petition for *certiorari*.

DATED: October 22, 2002

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Supreme Court, U.S.
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No. 01-1882

IN THE

Supreme Court of the United States

THE CITY OF LONG BEACH,

Petitioner,

v.

JOHN B. FAIRLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I.

RESPONDENT FAIRLEY'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY PETITIONER CITY OF LONG BEACH.

It is abundantly clear from the authority cited by Respondent Fairley that the City of Long Beach's Petition for a Writ of Certiorari should be granted and that Respondent Fairley's due process rights were not violated by the City of Long Beach.

Respondent in his Brief in Opposition cites to *Sanchez v. Swyden*, 139 F.3d 464 (5th Cir. 1998). In *Sanchez*, plaintiff was held for twenty-six hours on a warrant, even though defendant police officers had exculpatory fingerprint information and other identification evidence within two hours of the detention. The plaintiff in *Sanchez*, like Respondent Fairley, asserted that his constitutional rights were violated because no one compared his fingerprints to those of the suspect until almost twenty-four hours after his initial detention. The Fifth Circuit, relying on this Court's decision of *Baker v. McCollan*, 443 U.S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979), ruled in favor of the defendant officers and held that plaintiff had "not shown that the defendants deprived him of a clearly established constitutional right." (139 F.3d at 1565.) City of Long Beach respectfully submits that the Ninth Circuit's decision of *Fariley v. Luman*, 281 F.3d 913 (9th Cir. 2002), is in direct conflict with the Fifth Circuit's *Sanchez* decision and this Court's decision in *Baker*.

Respondent in his Brief in Opposition cites to *Cannon v. Macon County*, 1 F.3d 1558 (11th Cir. 1993). In *Cannon*,

the plaintiff filed suit alleging the she was mistakenly arrested and held on a fugitive warrant. The Eleventh Circuit ruled that "in cases dealing with prisoners and other persons in state custody . . . a showing of deliberate indifference is required to establish a violation of substantive due process rights protected by the fourteenth amendment." (1 F.3d at 1563.) The Eleventh Circuit held that while there was sufficient evidence from which a jury could find that the arresting officer acted with deliberate indifference when he completed the arrest procedure, there was no basis for County liability. The Eleventh Circuit stated that liability did not attach to the Sheriff or County because "it is difficult to see how the Sheriff would have final authority over who each deputy arrests and whether a deputy has probable cause to arrest and/or hold arrestee." (1 F.3d at 1565.)

Respondent in his Brief in Opposition cites to *Brown v. Patterson*, 823 F.2d 167 (7th Cir. 1987). In Brown, plaintiff Anthony Brown was arrested on a warrant for an Anthony Moseley who used an alias of Anthony Brown. Plaintiff was held twenty-four hours at the Harvey Police Station, then transported to Cook County Jail, where he spent another twenty-four hours before posting $7,500 bond and being released. Plaintiff Brown was not fingerprinted nor was any other effort made to determine whether he was really the fugitive Moseley. The Seventh Circuit ruled in favor of the defendant officers, city and county and held that plaintiff's constitutional rights had not been violated by any of the defendants. City of Long Beach respectfully submits that the Ninth Circuit's decision of *Fariley v. Luman*, 281 F.3d 913 (9th Cir. 2002), is in direct conflict with the Seventh Circuit's Brown decision.

Respondent in his Brief in Opposition cites to *Patton v. Przybylski*, 822 F.2d 607 (7th Cir. 1987). In *Patton*, plaintiff was arrested on a warrant and the arresting officer refused to take plaintiff's fingerprints or photographs for comparison with the person sought in the warrant. Fourteen hours later plaintiff was transported to Cook County Jail. Plaintiff was held in Cook County Jail for six days, when a judicial officer realized that plaintiff was not the person sought in the warrant. The Seventh Circuit, relying partly on this Court's decision of *Baker v. McCollan*, 443 U.S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979), ruled in favor of the defendant officer and sheriff. City of Long Beach respectfully submits that the Ninth Circuit's decision of *Farley v. Luman*, 281 F.3d 913 (9th Cir. 2002), is in direct conflict with the Seventh Circuit's *Patton* decision and this Court's decision in *Baker*.

Respondent in his Brief in Opposition cites to *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989). *Brown* is distinguishable from the present case in that the defendant officer in *Brown* altered the warrant in question. The defendant officer changed the name on the warrant, the driver's license number on the warrant, and the address of the suspect. The defendant officer also added plaintiff's appearance and date of birth to the warrant. The Fifth Circuit, in upholding judgment against this defendant officer, ruled that the defendant officer's alteration invalidated the warrant.

Respondent in his Brief in Opposition cites to *Rivas v. Freeman*, 940 F.2d 1491 (7th Cir. 1991). In *Rivas*, the Eleventh Circuit affirmed a judgment against a sheriff for failing to establish appropriate procedures and policies regarding identification of prisoners. *Rivas*, however, is distinguishable from the present case in that evidence was presented at trial, which established that the defendant sheriff

knew of prior instances of mistaken identity. In the case before this court, there is no evidence of a pattern of similar incidents prior to plaintiff Fairley's arrest.

In the present case, plaintiff Fairley was held on a valid warrant, and after two days, plaintiff was turned over to the Los Angeles County Sheriff's Department who handle the outstanding warrants for the Los Angeles County Court System. Pursuant to *Baker* and the above mentioned cases from other circuits, the detention of plaintiff did not violate his constitutional rights.

II.

CITY OF LONG BEACH IS NOT RESPONSIBLE FOR ANY VIOLATION OF RESPONDENT FAIRLEY'S CONSTITUTIONAL RIGHTS.

As set forth in the City of Long Beach's Petition, a municipality or governmental entity cannot be found liable under Section 1983 on a respondeat superior theory. (*Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412 (1989).)

Respondent Fairley refers to defendants' responses to Requests for Admissions, admitting that the arrest of Respondent Fairley on the warrants was "in accordance with and pursuant to the policies and practices of the Police Department of the City of Long Beach." The existence of a policy, without more, is insufficient to trigger local government liability under section 1983. (*Canton v. Harris*, 489 U.S. at 388-89.) Under *Canton v. Harris*, before a local government entity may be held liable for failing to act to preserve a constitutional right, plaintiff must demonstrate that the official policy "evidences a 'deliberate indifference'"

to his constitutional rights. (*Id.* 489 U.S. at 389.) This occurs when the need for more or different action "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent to the need." (*Id.* 489 U.S. at 390.)

In the present case, there was no evidence of any prior incidents of a twin or other person being mistakenly held on a warrant prior to plaintiff's arrest. There was no evidence presented to place any official from the City of Long Beach on notice that its procedures that were in place at the time of plaintiff's arrest were in anyway inadequate. Plaintiff cannot prove the existence of a municipal policy based solely on a single incident. (*See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791 (1985).)

The City of Long Beach has always contended and the jury agreed that the individual officers acted properly and with probable cause to arrest. The City of Long Beach's policy is to arrest people if probable cause is established, and the City of Long Beach obviously ratifies and condones arrests that are made with probable cause. There is no evidence of any unlawful arrest.

In his Opposition, Respondent Fairley appears to concede that the Ninth Circuit erroneously asserts that the City of Long Beach had no procedures in place to alleviate the problem of detaining individuals on the wrong warrant. Respondent Fairley concedes that when a person is arrested by a Long Beach Police Officer "a fingerprint classifier will classify the fingerprints to verify the person in custody is in fact the person he says he is, and any added charges or holds or warrants are verified against fingerprints if they are available . . . and that DMV records were suppose to be checked." (*See* page 16 of Respondent's Brief in Opposition.)

III.

SINCE THE JURY FOUND THAT THE INDIVIDUAL OFFICERS DID NOT USE EXCESSIVE AND/OR UNREASONABLE FORCE AND THE INDIVIDUAL OFFICERS DID NOT ARREST AND/OR HOLD PLAINTIFF WITHOUT PROBABLE CAUSE, THERE CAN BE NO BASIS FOR LIABILITY AGAISNT THE CITY OF LONG BEACH.

Respondent fails to address the fact that the Ninth Circuit misstates this Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). In an extreme departure from well settled law, the Ninth Circuit erroneously states that this Court's decision in *Heller* was controlling authority ***only*** as to plaintiff's excessive force case and that *Heller* had "no bearing on [plaintiff's] Fourth and Fourteenth Amendment claims against the City for arrest without probable cause and deprivation of liberty without due process." (*Fairley v. Luman* 281 F.3d 913, 916-17 (9th Cir. 2002).) Contrary to the Ninth Circuit's decision, *Heller* concerned claim of excessive force and arrest without probable cause.

In the case before this Court, the jury found that none of the defendant officers used excessive force and that the defendant officers did not arrest and/or hold plaintiff without probable cause. These findings are conclusive that no constitutional harm was inflicted on plaintiff.

In his Brief in Opposition, Respondent Fairley speculates that "the jury could have concluded that Ford (the booking sergeant) shouldn't be held personally liable for booking Mr. Fairley on Joe's warrants because that error was due to

the failure of somebody in Records to check fingerprints or DMV records." (*See* page 17 of Respondent's Brief in Opposition.) Even if Respondent's speculation was true, a plaintiff cannot prove the existence of a municipal policy based solely on a single incident (*See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791 (1985).), nor is negligence sufficient to establish a deprivation of a liberty interest pursuant to 42 U.S.C. § 1983 (*See Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662 (1986).).

CONCLUSION

For all of the foregoing reasons, Petitioner City of Long Beach respectfully request that its petition for a writ of certiorari be granted.

Respectfully submitted,

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